In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 232

VERLYN G. MARTH AND NINA T. MARTH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In June, 1954 petitioner,[1] a flight test engineer, was transferred by his employer from Santa Monica, California to Edwards Air Force Base near Lancaster, California. Shortly thereafter petitioner's family arrived in Lancaster and he purchased a house there. In 1956 he sold his home near Santa Monica. He and his wife banked and voted in Lancaster. Except for short, temporary absences, petitioner was assigned to Edwards continuously from 1954 until 1962. On his federal income tax return for 1958 petitioner did not report "per diem" payments received from his em-

[1] Nina T. Marth is a party solely because she filed joint returns with her husband.

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ployer, claiming that the amount of such payments was offset by deductions for meals and lodging in Lancaster (Tax Court opinion, pp. 7–12). The Tax Court disallowed the deductions and the court of appeals affirmed per curiam.

Section 162(a)(2) of the Internal Revenue Code of 1954 allows a deduction for "all ordinary and necessary expenses * * * incurred * * * in carrying on any trade or business, including * * * traveling expenses * * * while away from home in the pursuit of a trade or business." To be deductible, traveling expenses must be necessary and reasonable, must be incurred in pursuit of business, and must be incurred while away from home. *Commissioner* v. *Flowers*, 326 U.S. 465. The only home petitioner maintained in 1958 was in Lancaster, near Edwards Air Force Base, his place of employment. He was not "away from home" while at Edwards. The expenses he seeks to deduct are non-deductible, personal, living expenses one would incur at any permanent place of residence.

The decision is correct and there is no conflict of decisions. The petition should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN B. JONES, JR.,
Acting Assistant Attorney General.

HAROLD C. WILKENFELD,
ROBERT H. SOLOMON,
Attorneys.

JULY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965